car is being used for teaching a third party to drive, cannot be heard to say in the words of Denning L.J. that he has hired the car to the third party for the purpose in which he, as owner 'has no interest or concern'. For these reasons I am of opinion that the liability of the first defendant for the negligence of the second defendant as his agent has been fully established."

The question whether a person is an agent of another is substantially a question of fact. The Privy Council in the recent case of *Rambarran* v. *Gurrucharran*[2] referred to a judgment of the Court of Appeal of New Zealand in the case of *Manawatu County* v. *Rowe*[3] and summarised the principles laid down by that court in the following terms:

"After considering the English cases of *Barnard* v. *Sully*[4] and *Hewitt* v. *Bonvin*[5] and certain New Zealand and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus:—

(1) The onus of proof of agency rests on the party who alleges it.

(2) An inference can be drawn from ownership that the driver was the servant or agent of the owner, or in other words, that this fact is some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue or if such other evidence as there is, fails to counterbalance it.

(3) It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concern."

In my view even if assuming that the learned judge was right that this was a case of surreptitious hiring, that fact has not created a relationship of principal and agent as between the two defendants in this case. The evidence in this case would appear in my view conclusive that the first defendant used the car for his own benefit and on his own concern and for that reason I would say that the second defendant would not be liable for the negligence of the first defendant. I would allow the appeal with costs here and in the court below.

Suffian F.J.: With respect I agree with my Lord, the Lord President. I agree that this appeal be allowed with costs here and below.

The car responsible for the accident was owned by the second defendant (appellant). There was therefore a presumption that the driver who drove it at the time of the accident (first defendant and second respondent here) was the agent of the owner. Whether or not he was an agent is a question of fact. As was said in the Privy Council case referred to by my Lord the Lord President, the owner can repel the inference that the driver was his agent in one of two ways: one, by giving or calling evidence as to the driver's object in making the journey in question, and, secondly, by simply asserting that the car was not being driven for the owner's purpose and proving that assertion by means of such supporting evidence as was available to him.

Here the owner adopted both ways of proving that he had no interest or concern in the driver's journey. The driver used the car to convey his own goods to some people in Kepala Batas and the owner did not ask him to convey anything for him or do anything for him there. Even if it is true that the car had been surreptitiously hired, I do not think that in these circumstances it can be said that the owner had any interest or concern in the driver's journey.

As the owner had no interest or concern in the driver's journey, he (the owner) is not responsible for the driver's negligence.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *Khoo & Sidhu; Jayadeva, Zahir & Ismi.*

MAHA SYNDICATE v. COOPERATIVE EXPORTVERENIGING "VECOFA" U.A. & ANOR.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) July 3, 1970]

[Penang — Federal Court Civil Appeal No. X. 118 of 1969]

Bills of Exchange — Definition of — Whether a document "payable at 10 days sight D/A on arrival of steamer" is a bill of exchange — Bills of Exchange Ordinance, 1949, ss. 3 and 11.

Evidence — Technical expressions — Evidence Ordinance, 1950, ss. 93 and 98.

In this case the plaintiffs had drawn on the defendants bills of exchange which were expressed to be "payable at 10 days sight D/A on arrival of steamer" in the case of the first and third bills and at "60 days sight D/A from date of arrival of vessel" in the case of the second bill. Judgment was given against the defendants as acceptors on the bills of exchange ([1970] 1 M.L.J. 187). The defendants appealed and on the appeal it was argued that none of the documents was an unconditional order to pay on demand or at a fixed or determinable future time, but that all the bills were expressed to be payable on a contigency and were therefore not bills of exchange within the meaning of the Bills of Exchange Ordinance, 1949. Two witnesses were called on behalf of the plaintiff at the trial to show that payment on the bills was not conditional on arrival of the steamer and their evidence was accepted by the learned trial judge.

Held, dismissing the appeal: (1) in view of the uncontroverted evidence about the bills of exchange which was accepted, the learned trial judge was right in giving judgment for the plaintiff;

(2) in this case the evidence was rightly admitted under section 98 of the Evidence Ordinance to show the meaning of "technical expressions and words used in a peculiar sense."

Cases referred to:-

(1) *Palmer & Ors.* v. *Pratt* 2 Bing. 185, 192.

(2) *The Cardiff Boarding Master's Association* v. *Cory & Sons* (1893) 9 T.L.R. 388.

The following additional cases were cited in argument: *Das* v. *Pershad* 46 I.A. 33, 35; *Palmer* v. *Pratt* 130 E.R. 277; *Alexander* v. *Thomas* 117 E.R. 906; *Willliamson & Ors.* v. *Rider* [1962] 2 All E.R. 268, 272; *Orbit Mining & Trading Co. Ltd.* v. *Westminster Bank Ltd.* [1962] 3 All E.R. 565; *Colehan* v. *Cooke* (1742) 125 E.R. 1231, 1234; *Rosenheim* v. *C.B. of Australia* (1922) 31 C.L.R. 46; *Hill* v. *Halford* (1801) 126 E.R. 1357; *Browne* v. *Pickering* 4 T.L.R. 726; *W. Bank Ltd.* v. *Zang* [1966] 1 All E.R. 114, 117; *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1955] 3 All E.R. 864; *R. Mohanlal* v. *M. Kasturchand* A.I.R. 1949 Nagpur 21, (c); *H. Barua* v. *G.M. Chowdhry* A.I.R. 1931 Cal. 387, (a); *Jameson & Co.* v. *Phutt* A.I.R. 1936 Cal. 291; *Savage & Ors.* v. *Uwechia* [1961] 1 All E.R. 830; *Cossey* v. *McManus* 6 English & Empire Digest 179, 283; *Parminster* v. *Symons* 1 E.R. 780, 783.

FEDERAL COURT.

V. K. Palasuntharam (*R. K. Sharma* with him) for the appellant/defendant.

Lim Kean Siew (*Ayer* with him) for the first respondent/plaintiff.

C. O. Lim for the second respondent.

Suffian F.J.: The undisputed facts are as follows. The plaintiff is a Dutch company in Holland. The defendant is a firm in Penang.

On 5th March, 1963, the plaintiff drew upon the defendant bill of exchange No. 22396 for £2,200. The defendant accepted the bill, that is to say, it assented to the drawer's order. The bill was made payable to the order of the Amsterdamsche Bank. The bank endorsed it to the Mercantile Bank in Penang for collection and when presented to the defendant, the bill was dishonoured.

On 4th April, 1963, the plaintiff drew upon the defendant bill of exchange No. 22607 for £2,375. It was accepted by the defendant. The bill was made payable to the order of the same Dutch Bank who endorsed it to the Mercantile Bank in Penang for collection and when presented to the defendant, the bill was dishonoured.

On 10th April, 1963, the plaintiff drew upon the defendant bill of exchange No. 22605 for £3,562.10.0 again payable to the order of the same Dutch Bank. It was accepted by the defendant. The plaintiff endorsed it to the Hongkong & Shanghai Bank in Penang for collection. When presented to the defendant, this bill too was dishonoured.

The plaintiff sued as drawers against the defendant as acceptors on the three bills.

The amount on each of the bills was expressed to be payable "at 10 days sight D/A, on arrival of steamer" in the case of the first and third bills and "at 60 days sight D/A, from date of arrival of vessel" in the case of the second bill.

In their defence two of the defendant's partners contend that none of the documents is an unconditional order to pay on demand or at a fixed or determinable future time, but that all the bills are expressed to be payable on a contingency and are not therefore bills of exchange.

According to section 3 of the Bills of Exchange Ordinance No. 75 of 1949, "a bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand *or at a fixed or determinable future time* a sum certain in money to, or to the order of, a specified person, or to bearer. An instrument which does not comply with these conditions . . . is not a bill of exchange." Section 11 provides that "a bill is payable at a determinable future time which is expressed to be payable —

(a) at a *fixed* period after date or sight;

(b) on or at a *fixed* period after the occurrence of a specified event which is *certain* to happen, though the time of happening may be uncertain."

That section also provides that "an instrument expressed to be payable on a contingency is not a bill, and the happening of the event does *not* cure the defect."

It is argued on behalf of the two partners that payment on these bills is conditional on "arrival of steamer", which is uncertain, and the fact that the steamer arrives or has arrived does not cure the defect and therefore the bills are not bills of exchange.

Two witnesses were called on behalf of the plaintiff to show that payment on these bills was not conditional on arrival of steamer. The first witness was Mr. Joseph Deans, an assistant in charge of the bills section in the Mercantile Bank, Penang, and the second witness was Mr. Robert Valmond Leonard, an officer in the bills section of the Hongkong & Shanghai Bank, Penang. The effect of their evidence is the same: that the expression "60 days sight D/A on [or from] arrival of steamer [or vessel]" meant that each bill was to be presented to the defendant with documents such as bills of lading and invoices; that even then the defendant was not obliged to accept the bills; that the defendant might accept them either before or after the arrival of steamer; that if the defendant accepted the bills, the documents were to be released to it, but not until then; that thereupon the bills became payable within 60 days of acceptance, not from the arrival of steamer, and that the words "on [or from] arrival of the steamer [or vessel]" were merely instructions to the banks to defer presentment of the bills until arrival of steamer and not to release documents except after acceptance of the bills by the defendant.

In view of the above uncontroverted evidence which the learned judge accepted, I am of the opinion that with respect the learned judge was right in giving judgment for the plaintiff. This case is quite different from *Pulmer and Others* v. *Pratt*[1] where the bills in question were expressed to be payable "at 30 days after the arrival of the ship Paragon at Calcutta" and *The Cardiff Boarding Masters Association* v. *Cory & Sons*[2] where the bills in question were expressed to be payable "3 days after the ship Rollo sails". There the arrival or departure of the ships in question was an event uncertain to happen.

It is argued that the learned judge was wrong in admitting the evidence of the two officers of the Penang banks in view of section 93 of the Evidence Ordinance. I reject this argument. There is nothing "ambiguous or defective" in the expressions used in the bills except to laymen. To bankers and merchants they are perfectly plain, and evidence may be given under section 98 to show the meaning of "technical expressions and abbreviations and words used in a peculiar sense", which these expressions were.

The two partners in the lower court raised another defence, namely, that even if these documents were bills, the sum on them was not payable to the plaintiff as holder as the bills had not been endorsed in favour of the plaintiff. It will be recalled that the defendant in its defence raised only one defence based on section 3 of the Bills of Exchange Ordinance. I am of the opinion that the learned judge was right in rejecting

this defence because it had not been raised in its pleadings.

In my view the defendant, having accepted these bills, engaged to pay them according to the tenor of its acceptance (section 54(a), Bills of Exchange Ordinance) and I would therefore dismiss this appeal.

Finally, it should be mentioned that the defendant firm consisted of three partners. One of the partners, Mr. Tan Chow Soo, "on grounds of commercial morality" did not contest the claim and consented to judgment being entered against him with costs up to date of issue of writ. Only the other two partners, Madam Mahalingam Ratna Ammal and Mr. Mahalingam Ratnavale, contested the claim and in the event they have failed both in the lower court and here. Before us they cited Mr. Tan Chow Soo as second respondent. Mr. C. O. Lim for the second respondent asks for costs of attendance only should this appeal be dismissed; there shall be an order accordingly. The two partners should also pay the taxed costs of this appeal to the plaintiff. The deposit should be paid to the successful respondents towards payment of their taxed costs, in proportion agreed to by them.

Azmi L.P. and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Sharma & Co.; Lim Kean Siew & Co.; Lim, Lim & Oon.*

YEO BENG CHOW v. NEW INDIA ASSURANCE CO. LTD.

[F.C. (Ong C.J. (Malaya) Gill and Ali F.JJ.) July 6, 1970]

[Johore Bahru — Federal Court Civil Appeal No. X. 115 of 1969]

Insurance — Insurance against third party risks — Provision for maintenance of motor vehicle — Contravention — Term to be construed against insurance company — Contra proferentem principle — Road Traffice Ordinance, 1958, s. 80(1).

In this case the appellant had taken out a policy of insurance against third party risks for his motor lorry. The printed form of the policy issued was that used for the comprehensive insurance of commercial vehicles but clause 1 of the policy which referred to insurance against loss or damage "by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear" was deleted. The motor lorry was involved in an accident and damages and costs were awarded against the appellant. The insurance company paid the damages and costs but subsequently sought to recover these amounts from the appellant as damages for an alleged breach by the appellant of condition 3 of the policy. Condition 3 *inter alia* required the motor vehicle to be maintained in an efficient condition. In this case a vehicle's examiner had examined the lorry after the accident and found it to be not roadworthy. The insurance company obtained judgment against the appellant, who thereupon appealed.

Held, allowing the appeal: the conditions in the insurance policy must be construed *contra proferentem* against the insurance company. In this case because of the deletion of condition 1 in the policy, condition 3 had been mutilated and it could not be held that it was binding on the appellant as a condition which he knew or might to have known. In any event it had not been shown that the motor vehicle was not in an efficient condition.

Cases referred to:-

(1) *Jones* v. *Provincial Insurance Co. Ltd.* (1929) 35 Ll.L.R. 135, 136.

(2) *Harbutt's* v. *Wayne Truck Co.* [1970] 2 W.L.R. 198, 209.

(3) *Brown* v. *Zurich Insurance Co.* [1954] 2 Ll. Rep. 243, 246.

(4) *Quinn* v. *Leathem* [1901] A.C. 495, 506.

(5) *Conn* v. *Westminster Motor Insurance Association Ltd.* [1966] 1 Ll. Rep. 407, 414.

FEDERAL COURT.

M. S. Miranda for the appellant.

Thara Singh Sidhu for the respondent.

Cur. Adv. Vult.

Ong C.J.: On July 1, 1960 the appellant, a licensed haulier, took out a policy of insurance against third party risks for his motor-lorry. It was a 5-ton Austin of 1950 vintage which had stood the wear and tear of ten years' service. The printed form of the policy issued was that used for the comprehensive insurance of commercial vehicles. The evidence gives no indication whether third party insurance only was desired by the insured, or whether the insurers, by reason of the age and condition of the vehicle, were not prepared to insure it against loss or damage "by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear". At any rate an indorsement was made on the printed form that "it is hereby understood and agreed that section I of this Policy is deemed to be deleted". Then by a rubber-stamp the word "deleted" was impressed on section I and the exceptions thereto. Paragraph 1(a) of the section is in the terms above quoted.

On January 18, 1961 the appellant's lorry was involved in a collision with a Honda Cub 49 c.c. motorcycle driven by a learner-driver carrying a pillion passenger. The driver died of his injuries. The lorry was examined four days later, on January 22, 1961 by Chow Teik Khoon, a vehicles examiner then attached to the Road Transport Department in Johor Bahru. In his report he described the condition of the vehicle as follows (to quote only the relevant portion): —

"(2) the foot-brake was in order.

(3) the hand brake was not working.

(4) re the steering, the o/s track rod ball joints worn.

(5) re the tyres, both front tyres were bald and both rear 90% (bald).

(6) re the other components (1) front and rear spring shackle pins and bushes worn.

(2) o/s front wheel bearings very slack.

(3) vehicle discharges excessive smoke.

(4) rear floorboards holed.

(7) damage which appeared to have been caused in an accident was o/s front mudguard panel badly dented.

(8) the general condition of the vehicle discounting the effects of accident damage was: Not roadworthy. Items 3, 4, 5 and 6 above refers."

There is not a scrap of evidence that the condition or state of repair of the vehicle had anything to do